Office of Fair Trading

Anticipated acquisition by Unilever of Alberto Culver Company

ME/4805/10

The OFT's decision on reference under section 33 given on 18 March 2011. Full text of decision published 5 April 2011.

Please note that the square brackets indicate figures or text which have been deleted or replaced in ranges at the request of the parties or third parties for reasons of commercial confidentiality.

PARTIES

1. **Unilever** is an Anglo-Dutch company dual-listed on Euronext Amsterdam, through Unilever N.V., and the London Stock Exchange, through Unilever plc. Each entity exists as a separate company but operate together as a single economic unit. Unilever is active in the development, manufacture, distribution and marketing of fast moving consumer goods products, principally in the food, home care and personal care product categories through a wide range of brands. Unilever's group turnover in the 2009/10 financial year was [ ], of which the UK accounted for [ ].[1]

2. **The Alberto Culver Company** ('Alberto Culver') is a publicly listed US-based company active in the development, manufacture, distribution, and marketing of fast moving consumer goods, principally in the food, home care and personal care product categories through a wide range of brands. Alberto Culver's turnover for the year ending September 2009 was [ ],[2] of which [ ] was in the UK. The majority ([ ]) of Alberto Culver's turnover is generated in the US and Canada.

[1] The parties submitted [ ] and [ ], respectively converted using 2009 annual average spot exchange rate: £ to €: 0.8909 (*Source*: Bank of England).
[2] The parties submitted [ ], converted using 2009 annual average spot exchange rate: £ to US$: 0.9612 (Source*:* Bank of England).

TRANSACTION

3. On 27 September 2010, Unilever[3] agreed to acquire Alberto Culver for US$3.7 billion.

4. The administrative deadline for the OFT to make a decision was 8 March 2011.

JURISDICTION

5. As a result of the transaction Unilever and Alberto Culver will cease to be distinct. The UK turnover of Alberto Culver exceeds £70 million, so the turnover test in section 23(1)(b) of the Enterprise Act 2002 (the Act) is satisfied. The OFT therefore believes that it is or may be the case that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.

6. The transaction has been notified in a number of countries worldwide including the US and Ireland as well as the UK.

RATIONALE FOR MERGER

7. The parties consider that the transaction will enhance their product offering in certain personal care categories specifically, hair conditioning, styling and shampoos, and skin cleansing worldwide. The transaction will bring together a portfolio of well known brands.

8. As a result of the transaction, Unilever expects to achieve enhanced efficiencies and cost savings,[4] particularly in relation to the distribution and supply chain, manufacturing operations and administrative and support functions worldwide.

---

[3] Unilever N.V. and Unilever plc acting through affiliate companies Conopco, Inc. and Ace Merger, Inc.

[4] No specific evidence on the extent to which any efficiencies or cost savings arising from the merger would result in lower prices was submitted by the parties.

FRAME OF REFERENCE

9. The parties overlap in a number of personal care product categories in the UK, including hair care, hair styling, and skin cleansing. All the affected categories are characterised by high levels of differentiation and branding with significant advertising and/or promotional spending. Sales are principally to large retailers who then sell to final consumers.

10. Manufacturers are often active across a number of personal care product categories, as are many specific brands. The OFT considers the likely product scope to be narrower than the personal care category and considers market definition to begin with the overlapping products of the parties in the narrowest plausible candidate product market. In this case, this is narrower than all personal care products. We therefore consider individual product categories separately.[5]

11. In a number of personal care product categories the overlap between the notifying parties is limited as either one or both have minimal activity. The parties submit that in these narrow, plausible candidate product markets no competition issues can be expected to arise.[6] Third parties confirmed the parties have only small overlaps in these categories and raised no concerns. On this basis the OFT does not consider the following product categories further:

    - hand and body care
    - face care
    - lip care
    - deodorants.

12. The OFT therefore focused its investigation on the remaining product categories of hair care, hair styling and skin cleansing where the parties' overlaps are material.

---

[5] This approach is in line with the UK Authorities' joint *Merger Assessment Guidelines*, September 2010, paragraph 5.2.11.

[6] See *Merger Assessment Guidelines*, paras. 5.3.2 and 5.3.5.

Product scope

13. The OFT considers that product market definition provides a framework for assessing the competitive effects of the merger and involves an element of judgement. The boundaries of the market do not determine the outcome of the OFT's assessment in any mechanistic way and the OFT may take into account ways in which some constraints—inside the market or outside it—are more important than others.

14. The OFT's approach has been first to consider whether narrow candidate product markets may be widened through demand-side substitution and then, if appropriate, to consider if substitution on the supply-side allows several products, which are not demand-side substitutes, to be aggregated into one wider market.[7]

15. In assessing demand-side substitution, the majority of retailers pointed to there being little distinction between patterns of substitution at the wholesale level (sales by product manufacturers to the retailer) and patterns of substitution at the downstream retail level (sales by retailers to the end-customer) as the two are driven by consumer preferences. Retailers generally considered their own behaviour to be driven entirely by end consumers. The OFT notes, however, the product markets appear to be characterised, to varying degrees, by factors which may mean the preferences of retailers and consumers sometimes differ.[8] This is addressed as part of the competitive assessment.

Skin cleansing

16. Skin cleansing includes bar soaps, liquid hand wash, and products for use in the bath or shower. However, the overlap between the notifying parties in bath and shower products is limited,[9] which was also confirmed by third parties who raised no concerns in relation to bath and shower products. The OFT notes that market shares suggest that no competition concerns are likely to arise if bath and shower products are considered as a distinct narrow product market. Neither did the OFT receive any evidence that the parties' differentiated brands were substantially closer competitors than

---

[7] See *Merger Assessment Guidelines*, paras.5.2.6 to 5.2.19.

[8] For example, differing price sensitivities and switching capabilities between the two levels, differences in the extent to which a price increase upstream is passed through to end customers and non-linear pricing.

[9] This is also true at a narrower scope, considering bath or shower products as distinct markets.

their low market shares would imply. Further, exclusion of the category does not materially affect the competitive assessment for bar soaps and/or liquid hand wash. The OFT therefore does not consider bath and shower products further.

Bar soaps and liquid hand wash

17. The parties consider there to be significant overlap between bar soaps and liquid hand wash and focus on the absence of a material distinction between them. The ease of substitution between the two, they submit, is based on, first, the recent growth in demand for liquid hand wash at the direct expense of bar soaps; second, the two having the same primary use; and, finally, both products being part of the same retail display shelf and so retailers being able to replace bar soap with liquid hand wash over time.[10]

18. The OFT's investigation did not support there being significant substitution between bar soaps and liquid hand wash. Almost all retail customers indicated they would accept a price rise, rather than switch to liquid hand wash, in the event of a uniform SSNIP of five per cent in the price of bar soaps. Similarly, retail customers indicated they would accept a price rise, rather than switch to bar soaps, in liquid hand wash. Competitors mostly agreed with this view, despite accepting there is a gradual switch from bar soaps to liquid hand wash over time. No further distinctions were considered relevant by third parties.

19. The OFT considers that markets are defined primarily on the demand-side. In this case, the evidence on demand-side substitution in relation to bar soaps and liquid hand wash has not proved sufficient for the OFT to broaden the market to include both types of product, the OFT has however considered the scope for supply-side substitution. As is set out in its Guidelines, the OFT may aggregate several narrow markets into one broader one on the basis of supply-side substitution when:

(a) production assets can be used by firms to supply a range of different products that are not demand-side substitutes, and the firms have the ability and incentive quickly to shift supply between these different products depending on demand for each, and

[10] Shelf pictures were submitted by the parties confirming this.

(b) the same firms compete to supply these different products and the conditions of competition between the firms are the same for each product.[11]

20. In relation to (a), the majority of competitors generally considered it difficult for a supplier of either bar soap or liquid hand wash to switch to the other following a SSNIP of five per cent in one. Both have very different manufacturing processes, are manufactured at different factories, and use different equipment. Only one competitor highlighted the possibility of outsourcing to contract manufacturers.

21. In relation to (b), although broadly the same manufacturers supply both bar soaps and liquid hand wash, brands have very different presences in each. For example, Carex is the leading liquid hand wash but has a very small presence in bar soaps and Radox which is the second strongest brand in liquid hand wash has no presence in bar soap. Similarly, Unilever's Dove is the leading bar soap brand but only the eighth strongest liquid hand wash brand. This would tend to suggest that aggregating any markets rendered indistinct by virtue of supply side substitution—which, in any event, does not seem likely given the evidence in relation to (a)—would not be appropriate.

22. The OFT therefore does not consider the conditions under which supply-side substitution would allow the narrow candidate product markets in which the parties are active to be aggregated are met in this case.

Conclusion on skin cleansing

23. The OFT considers it appropriate, on the evidence available to it, to take a cautious approach and assess the competitive effects of the merger in relation to bar soaps and liquid hand wash separately.

24. Further distinctions within these categories, which may point to a narrower candidate product market (for example, on price or product attributes) were not considered material by third parties. The OFT considers that, to the extent that they may be relevant, further distinctions will therefore be reflected in a direct assessment of the effects of the transaction, which takes account of the closeness of competition between brands.

---

[11] *Merger Assessment Guidelines*, para. 5.2.17.

Hair styling

25. Hair styling includes products such as hairspray, mousse, gel, wax, and cream, designed to shape and style the hair. The European Commission has in the past suggested that distinct product markets may exist for different hair styling formats, due to the different functions of these products.[12] The parties overlap only in gels, waxes, creams and (non-aerosol) styling sprays.

26. The parties submit that, although certain styling products and formats are better at achieving certain results than others (for example, gels for short hair, hair spray for long hair), the majority of variants are substitutable on the demand-side with the exception of hairspray, which the parties consider is dissimilar in function to (and not generally interchangeable with) other formats. The parties therefore consider that all other styling products (including gel, wax, mousse, and cream) form a single product market as there is significant overlap between them in terms of styling functionality. The parties submit that a consumer would be more likely to remain in a brand and switch format than vice versa. Additionally, the parties consider there to be a number of SKUs which span different formats (gel and wax, for example).

27. The OFT's market investigation did not support the parties' submission. Third parties considered that both retailers and consumers would accept a uniform price rise of f per cent in one format, rather than switch to another format. Retail customers generally stated that consumers were more likely to switch brand and remain loyal to the format than vice versa and this drove their own sourcing behaviour. This was particularly true for hairspray but also for other formats. Two customers indicated that substitution may be possible among some styling pots (gel, wax, and cream) but not between mousse, gel or hairspray. The views of competitors were more mixed.

28. As the evidence on demand-side substitution in relation to hair styling is mixed, the OFT has considered the scope for supply-side substitution.

29. The parties submit that on the supply side, the manufacturing process for all styling products is similar and the production of new variants involves

[12] See Comp/M.3149 *Procter & Gamble /Wella*, ECMR, July 2003, paras.16 and 17. The precise product scope was left open.

minor adjustments in formulation.[13] The parties suggest manufacturers could also outsource the manufacture of products to a third party. Given the low costs and short lead-times for switching between formats, both in terms of manufacturing costs and advertising/branding costs,[14] the parties therefore submit that it is not appropriate to segment the hair styling market by format on the supply-side. Further, the parties submit that many manufacturers already use these options to produce their current product ranges,[15] but this was not necessarily confirmed by third parties who responded to the OFT's investigation.

30. Using the framework for supply-side substitution outlined above in relation to skin cleansing (see paragraph 19):[16]

- In relation to (a), the OFT's market investigation indicated a number of competitors considered that switching capacity between formats would be difficult as each format has different packaging requirements and technical formulations and would therefore involve substantial time and cost implications. However, one competitor highlighted the possibility of outsourcing supply to contract manufacturers making substitution more straightforward, but the only other competitor that raised this possibility indicated that third party manufacturers may have capacity constraints.

- in relation to (b) whilst most manufacturers active in hair styling appear to supply a range of formats, the strength of specific brands varies significantly across different formats. This would tend to suggest that aggregating any markets rendered indistinct by virtue of supply side substitution—which, in any event, does not seem likely given the evidence in relation to (a)—would not be appropriate.

31. On this basis, the OFT considers it appropriate to assess the competitive effects of the merger in relation to different formats (gel, wax, cream, and styling spray) separately. However, in the absence of competition

---

[13] The parties submit that the cost of a major change on a styling product would generally be less than £200,000 for new parts for the line, and could normally be completed within six to eight weeks.

[14] The parties submit that in terms of advertising and promotion costs, the costs of switching between formats are modest as it is standard for a range of styling product formats to be marketed under a single brand for example, Alberto Culver's VO5 styling range.

[15] [ ]

[16] *Merger Assessment Guidelines*, para. 5.2.17.

concerns, the OFT does not consider it necessary to conclude on the precise product scope.

Hair care

32. The hair care category includes all products designed to clean, condition or repair the hair. The parties overlap in the supply of shampoos, conditioners, and treatments. Shampoos clean the hair, conditioners are rinse-through products that are applied for a short period, usually after washing, and treatments are generally more intensive, designed to treat or protect the hair or scalp, so are left on the hair for longer and used less frequently.

33. In the UK, hair care sales are made through two distribution channels, to retail customers and to professional salon customers. The European Commission in past cases has considered the two channels distinct.[17] In this case, the parties also consider such a distinction to exist as sales through the two channels are characterised by different brands and differences in packaging designs, prices, and, in some cases, the underlying product (where products in the salon channel can contain stronger chemicals).

34. The parties overlap only to a very limited degree in sales to the professional salon channel.[18] As this channel has no material impact on the competitive assessment, the OFT does not consider it further, although the precise product scope in relation to distribution channels is left open. The subsequent assessment for the case therefore relates only to the retail channel.

35. The parties initially submitted the sector comprises two distinct markets: (i) shampoos; and (ii) conditioners and treatments, although they note that distinguishing between any of the three is not reflective of the relationship between the products. According to the parties:

- all three are generally marketed, promoted and purchased together by consumers as part of an overall hair care regime
- hair care brands invariably feature both shampoo and conditioning products in their range and on its packaging, each product refers to the other

[17] See, for example, *Procter & Gamble /Wella*, paras.10-12.
[18] Unilever had sales of [ ] in 2009 through its TIGI brand while Alberto Culver had sales of just [ ] in 2009, relative to an estimated total UK market size of around £129 million.

- both shampoos and conditioners are generally sold alongside each other in store, and

- negotiations with retailers generally take place with one buyer for the entire hair category (including hair styling).

36. The hair care process is sequential or incremental, described by one third party as having three steps: shampooing, conditioning, and possibly then treatment. By the nature of this process, the OFT considers it appropriate to assess the extent to which (a) shampoo and conditioners; and (b) conditioners and treatments form a single product market. Both of these would then be required to consider shampoos, conditioners and treatments as a single product market.

Shampoo and conditioner

37. Conditioner is used by a smaller proportion of consumers than shampoo[19] and, by its nature, is considered a complement to shampoo for the final consumer. Given the complementary nature of shampoo and conditioner, and the sequencing in their use by final consumers described above, the OFT considered whether shampoo and conditioner can be aggregated into a single product market on the demand-side if customers predominantly purchase both products from the same supplier.[20] This is especially likely where customers consider the price of conditioner when making their purchase decision for shampoo ('whole life costing').

38. Retail customers indicated they source shampoo and conditioner together, purchasing the matching conditioner brand when sourcing the shampoo. However, the retail customers also indicated that the products are not necessarily sourced in the same quantities reflecting end-user's purchasing patterns as not all customers who purchase shampoo also purchase conditioner.[21] Further, the OFT understands that different brands of conditioner and shampoo are compatible with one another (for example, the OFT received evidence that some end-users mix-and-match different brands of shampoo and conditioner). And the OFT received no evidence that consumers 'whole life cost' when buying shampoo (for example, the

[19] This was supported by information provided by third parties.
[20] This is described in detail in the Merger Assessment Guidelines, paragraph 5.2.20 in relation to secondary products.
[21] The parties submitted that [ ] of shoppers purchase shampoo and conditioner together (Source: Dunhumby). A third party indicated the proportion to be 35 per cent.

parties told the OFT that consumer purchasing of shampoo and conditioner together is driven by the price of the shampoo).

39. On a cautious basis, therefore, the OFT has considered shampoo and conditioner separately for the purposes of its competitive assessment of the merger.

Conditioners and treatments

40. The parties submit that conditioners and treatments are a single product market as, on the demand-side, they perform the same function. Those consumers that use treatments use them on average more than twice a week,[22] indicating consumers that use treatments use them as a substitute to conditioners. The European Commission has in the past been sceptical of the two forming a single product market.[23]

41. The OFT's market investigation in this case did not support the parties' submission of a single product market for conditioners and treatments. The majority of retailers stated the two were not substitutable (at the retail or final consumer level) and they would not switch between the two in the event of a SSNIP of five per cent. Treatments were considered heavier on the hair, provided additional benefits such as hair protection, and were used less frequently due to their intensity. Treatments are also substantially more expensive than conditioners.[24]

42. The majority view of retailers[25] was also supported by competitors who indicated that, while both are after-shampoo hair care, conditioners are more widely used and less expensive than treatments. Further, a price rise of conditioners would not lead to retailers (or end-consumers) switching to treatments. The balance of evidence therefore suggests that conditioners and treatments are not substitutes on the demand-side.

---

[22] Conditioners are used on average by women in the UK [ ] per week (shampoos [ ] per week). Based on data from Kantar Worldpanel for 2009.

[23] *P&G/Wella*, para. 15. The Commission's market investigation indicated the majority of customers considered conditioners and treatments to constitute separate product markets.

[24] Significant supporting evidence was provided by third parties pointing to a price difference (of up to 50 per cent) between the products. The OFT has also noted the absence of co-movement of prices of the two products over time.

[25] Only one retail customer considered them to be substitutes and indicated they would switch between them if necessary.

Supply side substitution

43. The evidence on demand-side substitution in relation to shampoos, conditioners and treatments was very mixed. The OFT has therefore considered whether different demand-side markets may be rendered indistinct on the basis of supply-side substitution and, if so, whether it may be appropriate to aggregate these markets. We use the same framework as for the previous product categories and outlined in detail in relation to skin cleansing (see paragraph 19).

44. In respect of paragraph 19(a), the parties submit that shampoos, conditioners and treatments contain similar ingredients and are manufactured using similar processes and supply-side substitution is straightforward.

45. However, some third parties indicated that switching capacity between shampoo and conditioners and between conditioners and treatments in response to a SSNIP of five per cent, while not technically difficult, would involve substantial costs. There were differences in standard sizes, formulas, materials and packaging, such that the entire tooling for the production line would have to be changed. Capital costs of around £2 million with a lead time of six months for switching capacity from any one to another were estimated by one third party.[26, 27]

46. In respect of paragraph 19(b), the parties submit conditioners and treatments are commonly marketed under a single brand. The OFT's market investigation found the same brands generally competed against each other in shampoos and conditioners with some exceptions. However, this was less true of treatments where competitive conditions were less similar: different brands (and, to a lesser extent, different firms) competed against each other in each segment. [ ].[28,29]

Conclusion on hair care

---

[26] Based on pricing and sales volume information provided by the parties, the OFT has calculated that the additional revenue obtained by a hypothetical monopolist from a five per cent price rise in either of the products would fall very significantly short of this estimated capital cost and the payback period would be significant. This would be before taking account of any fall in demand as a result of the price rise or marginal costs that would result in less additional profits, relative to additional revenue.

[27] As with previous product categories, only one competitor highlighted the possibility of outsourcing to contract manufacturers.

[28] [ ].

[29] [ ].

47. The OFT's market investigation did not support a single product market for shampoo and conditioner or for conditioner and treatment. The OFT considers that this precludes a single product market for shampoos, conditioner, and treatments taken together. Evidence on supply-side substitution and aggregation supported this view, with competitors highlighting the difficulty in switching capacity from one to the other. Defining narrower markets by variant ('dry', 'normal', for example) did not appear appropriate.[30]

48. As a result, the OFT considers it appropriate to assess the competitive effects of the merger in relation to shampoos, conditioners and treatments separately. However, in the absence of competition concerns, the precise product scope is left open.

Conclusion on product scope

49. For the purposes of the competitive assessment, the OFT considers:

- in skin cleansing, taking a cautious approach, bar soaps and liquid hand wash as separate markets
- in hair styling, taking a cautious approach, hair styling formats of gels, waxes, creams and styling sprays as separate markets, and
- in hair care, shampoos, conditioners and treatments as separate markets.

Geographic scope

50. A number of the parties' personal care brands are active globally, as are the brands of their main competitors in personal care categories. Despite this, the European Commission in past cases[31] involving personal care categories has considered the geographic scope to be national, on the basis that shares of supply, consumer preferences, and retail prices differ between Member States, and procurement and price negotiation take place

---

[30] The OFT considered whether different shampoo and conditioner variants ('dry', 'normal', 'anti-dandruff' or 'blonde', for example) may constitute separate markets. Although variants were not considered to be demand-side substitutes by third parties, there was unanimous and overwhelming support for aggregating them on the basis of supply-side substitution.

[31] See, for example, *Unilever/Sara Lee Body Care*; *Henkel/Schwarzkopf*; *P&G/Wella*; *L'Oreal/The Body Shop; Capman/Litorina/Cederroth;* and Case No. COMP/M.3732 *Procter & Gamble/Gillette*, ECMR, July 2005.

at a national level, even with those customers that operate at a multi-national level.

51. The parties submit[32] that a national scope also applies in this case as there are significant differences in the conditions of competition between countries, including the retail customers active in each country, the degree of concentration of these retail customers, the brands which are active in each country, and the strength of private label products. Moreover, the acquisition itself does not involve broader than national markets.

52. The OFT has received no evidence to support departing from this approach on any of the product categories. We have verified that a wider geographic scope, such as the British Isles,[33, 34] would not materially affect the competitive assessment. The OFT has therefore examined this case at a UK level for all the product categories.

UNILATERAL EFFECTS

53. The OFT has examined the possibility that the merged entity could unilaterally impose prices above the pre-merger level or deteriorate its competitive offering. When products are highly differentiated, unilateral effects concerns are more likely if the brands of the merging parties are close substitutes. Where this is the case, the parties will recapture a significant share of the sales lost in response to a price increase post-merger, making the price rise less costly.[35]

---

[32] Submissions by the parties on the geographic scope are contained in the pre-notification Briefing Paper, submitted by the parties to the OFT, 28 October 2010. The OFT rely on this as the basis for the parties assessment as no information on geographic scope is contained in the informal submission.

[33] As was suggested by the parties, and rejected by the European Commission, in *Procter & Gamble/Wella*, paras.30-35.

[34] The parties indicated, in this case, certain customers, [ ], negotiate with suppliers for the UK and Ireland simultaneously.

[35] See *Merger Assessment Guidelines*, paragraph 5.4.9

Liquid hand wash

54. The parties provided estimates of shares[36] of the narrow market for liquid hand wash showing the parties' combined share of supply of around [15-25] per cent (by volume and value) in 2009 with a small increment of [zero-10] per cent through the acquisition of the Simple brand. The merger would slightly strengthen Unilever's position as the second strongest supplier. However, it would combine only the second (Radox) and fifth (Dove) strongest brands supplied by Unilever with the eighth strongest (Simple) supplied by Alberto Culver.

55. There are strong competitors, four of whom are larger than Simple. Any loss of competition between the Simple and Dove brands would appear to be mitigated by other players with similar product attributes to each of the parties' brands. Third parties generally raised no concerns.

56. Notwithstanding that liquid hand wash may not necessarily be the narrowest market satisfying the hypothetical monopolist test, the OFT has drawn the market narrowly. On this narrow market, the parties' combined share of supply (and the increment to it) are not high enough to give the OFT cause for concern over unilateral effects. The OFT further considers it unlikely that Simple represents a significant competitive constraint to Unilever (or vice versa) in liquid hand wash pre-merger. As a result, the OFT does not consider that the merger gives rise to a realistic prospect of a substantial lessening of competition in liquid hand wash on the basis of unilateral effects.

Bar soap

Shares of supply

57. Unilever is present in bar soaps through its Dove, Pears and Lux brands. Dove soap is part of the broader Dove product range and is marketed based on its moisturising properties, whereas Pears and Lux are more traditional brands, focusing on efficacy. Alberto Culver is present in soaps through its Simple brand which is part of its broader Simple product range, as well as the Cidal and Wright's specialist soaps.

---

[36] Shares of supply throughout this document are derived from *SymphonyIRI* data provided by the parties.

58. Post-merger the parties will have a combined share of supply of [30-40] per cent by volume and [40-50] per cent by value in bar soap. The merger will strengthen Unilever's position as the strongest supplier by sales and bring together the first and third strongest brands in Dove and Simple (the merger increment is [0-10] per cent).

59. PZ Cussons would remain the strongest competitor post-merger with the second ranked brand, Imperial Leather as well as the Mild Cream and Pearl brands (around [15-25] per cent share of supply), followed by Colgate Palmolive (Palmolive; [0-10] per cent) and Ceuta Healthcare (Shield; around [0-10] per cent). Beyond this, no other supplier would have a share of supply above two per cent, excluding private label, although there are a number of smaller brands which together account for around 15 per cent of sales.

60. In interpreting shares of supply, the OFT has considered how widely the market is drawn: a low combined market share on the narrowest market satisfying the hypothetical monopolist test will be a better indicator of the absence of potential competition concerns than the same share on a wider market.

61. On that basis, the parties' combined share of supply for bar soaps of [40-50] per cent by value is high enough to give the OFT concerns over unilateral effects, particularly as 'bar soaps' is not necessarily the narrowest market satisfying the hypothetical monopolist test.[37]

62. In the light of the differentiated nature of the parties' brands, the OFT has also considered ways in which some constraints—inside the market or outside it—are more important than others (see paragraph 13). This is discussed below.

Closeness of competition

63. All of the product categories under consideration are differentiated, with brands competing across a range of characteristics, including variants, design, quality and price. In assessing mergers where products are differentiated, the OFT considers that the greater the degree of substitutability between the merging firms' products, generally the more likely are unilateral effects to result from the merger.

[37] See Merger Assessment Guidelines, paragraph 5.3.5.

The parties' main brands' marketing positions

64. The parties submit that their main competing brands, Dove and Simple do not have similar product attributes and are entirely different products. Dove is not technically soap, according to the parties, but a synthetic detergent bar with strong moisturising properties. The brand is strongly positioned as a moisturising brand and heavily perfumed. Dove advertising focuses on distinguishing Dove from traditional soaps. Simple, in contrast, is a traditional soap with no perfume or colouring and no moisturising properties, according to the parties. It is positioned as a niche product targeted at individuals with sensitive skin. The parties provided results of customer surveys which focused on brand attributes to support their views.[38]

65. However, a number of third parties – both customers and competitors – disagreed and consider Dove and Simple to be close competitors in this segment. In particular, their very distinct attributes and marketing positioning was disputed by some third parties who indicate they share 'skin care' characteristics, and that Simple is considered to be a strong competitive constraint to Dove in the category.

66. In this regard, the OFT notes internal documents provided by the parties [ ].[39] [ ].[40]

67. The parties sought to address these concerns and provided a detailed review of the key documents[41] submitting that overall,[ ]. The parties note that these documents should be considered alongside other evidence and [ ].[42]

68. The OFT acknowledges that these internal documents should not be considered in isolation and must be considered alongside other pieces of evidence but most of the evidence collected during the investigation points to the brands being close competitors. Moreover, the question before the OFT is not whether the environment is currently sufficiently competitive, but rather, whether the merger will substantially lessen that competition. [ ].[43] [ ]. Lastly, the parties' argument that Imperial Leather is a closer

[38] Source: Millward Brown/Dynamic Tracking.
[39] [ ].
[40] [ ].
[41] [ ].
[42] [ ].
[43] [ ].

competitor to Simple than is Dove is not in itself probative of a lack of potential unilateral effects: the issue for the OFT is whether Simple and Dove are sufficiently close competitors, not whether there is one equally close or closer competitor to Dove than Simple.

Simple is a tertiary brand and retail shelf space is in decline

69. The parties submit Simple is merely a 'tertiary' or niche brand and looking at the overall sales data overstates significantly Simple's importance in bar soaps to retailers. The parties provided data which they submit indicates that, in contrast to Dove which has most of its SKUs listed in all major retailers, Simple has much more limited distribution.

70. The parties submitted that this limited distribution is in the context of a significant reduction in the number of bar soap SKUs and shelf-space 'facings' that retailers are stocking. The parties presented evidence to show the general decline in the number of SKUs of bar soaps being stocked by the major retailers and the parties told the OFT that they expect this trend to continue. The parties submitted shelf-space photos indicating that Simple generally has only one to three shelf-space 'facings' in a store, as do the other tertiary or niche brands, and there are a significant number of brands displayed.

71. The parties also highlight that since Dove's entry to the market (in the early 1990s) Simple's share has remained relatively steady with Dove instead taking share from other brands.

72. That the number of bar soap SKUs stocked by retailers may be in gradual decline is not in itself informative about the competitive assessment of the effects of a specific merger. The evidence submitted by the parties also indicates that retailers continue to seek to stock a range of brands, irrespective of the number of SKUs of each brand. Indeed, one customer commented that 'Dove and Simple are brands that customers expect to see on the shelves', indicating that they are competing for the same shelf space. Similarly, even if Simple is less widely distributed than Dove, this does not indicate an absence of competition between the Dove and Simple brands at the national level.

Pricing points

73. The parties submit that the two brands have very different retail price points to each other and provided analysis of SKU level data on prices for

Tesco, Sainsbury's, Asda and Morrison's. The analysis, based on the average prices of the main Dove and Simple SKUs in 2010, indicates that the retail price of Dove is higher than that of Simple, even when taking account of the number of bars within each SKU, the size of the soap bars, and price promotions of some brands.

74. However, set against this, the parties also provided information on wholesale prices which indicates that [ ].[44]

75. Consequently, it is not clear to the OFT what this mixed evidence on pricing at the wholesale and retail levels says about the closeness of competition between the parties' brands.

Evidence of switching between the parties' brands

76. The parties provided data which shows the extent of switching by end consumers between brands.[45] The OFT considers this data to provide a useful indication of the closeness of substitution between brands at the retail level and—given evidence that, in this case, consumers' preferences and those of retailers are closely aligned (albeit not synonymous), see paragraphs 15 and 83—a reasonable proxy for the diversion ratio between brands at the wholesale level.

77. However, the parties raise a number of issues with the data used to examine the interaction between brands. These relate to the specific data used and the extent to which this data, given its limitations, can provide useful inferences about the competitive constraints between brands at the wholesale level.

78. First, the switching data provided by Kantar Worldpanel is divided into switching for consumers who have increased their spending on a given brand and those who have decreased it.[46] The parties argue that both types of switching should be averaged to reflect overall switching from and to a brand as the data is likely to contain a significant amount of noise (as

---

[44][ ].

[45] This data, obtained from *Kantar Worldpanel*, relates to 'gross switching', the sum of all switching to, and all switching from, a particular brand to another between 2009 and 2010. For example, if £100 of sales switch from Dove to Pantene and £100 of sales switch to Dove from Pantene, the Dove/Pantene gross switching figures would be £200. The data is based on individual UK consumer panels. Panellists record all grocery purchases, either through a barcode scanner or online diary.

[46] It records both the switching *from* one brand to other brands, (based on consumer switching patterns when consumers decrease their spending on a given brand) and the switching *to* a brand from other brands (when consumers increase their spending on a given brand).

consumers' motivation for switching is not recorded in the data) and averaging all switching provides more reliable estimates, statistically speaking.

79. In the absence of further investigation in relation to what motivates the consumer switching behaviour recorded by Kantar Worldpanel, it was not possible for the OFT to determine the level of 'noise' in the data—nor whether the noise makes the observed switching larger or smaller than it would otherwise be at the retail level. Nonetheless, the OFT accepts that, in this case, any assessment of switching ought to include all switching information so as to attempt to address this.[47]

80. Second, the switching data does not take account of any switching outside of the category or of consumers who no longer purchase the brand. The parties submit that this can be taken account of by building in a 20 per cent diversion by consumers to 'outside goods'. The OFT notes that diversion to outside goods of this magnitude appears consistent with the profitability and elasticity of demand (so far as this can be ascertained) in this market. On this basis, the OFT has allowed for this level of diversion to outside goods.

81. Third, the parties consider that if they were to unilaterally raise the wholesale price of Dove, then a retailer would raise the retail price of Dove and, to some extent, the retail prices of Simple and other soap brands. That is, given retailer's incentives would be to adjust the prices of all the soap brands it stocks in response to a unilateral price rise by one of the suppliers, according to the parties. This implies wholesale diversion ratios lower than retail diversion ratios and a larger diversion to 'outside goods'.

82. Similarly, the parties compete for retailers' shelf-space not only against other bar soap suppliers but also suppliers in other product categories. Retailers' substitution options may therefore differ from consumers' substitution options, affecting the link between consumers' and retailers' preferences. In the same way, pricing at the wholesale level is non-linear so retailers may respond to price changes in a broader variety of ways than consumers (for example, by shifting shelf space allocation).

[47] There may be instances where this is not the case. For example, if there is supporting evidence as to what may have motivated the switching or if there is reason to believe that such aggregation may not capture scenarios where one merging brand constrains the other without the converse being true.

83. The OFT accepts there are reasons that may point to diversion at the wholesale level being lower than that at the retail level. However, the OFT does not consider that the parties' arguments indicate that wholesale switching must necessarily always be lower than retail switching for these reasons.[48] In the light of this, the OFT considers that the switching information is a reasonable proxy for diversion between brands at the wholesale level but is mindful of its limitations.

84. The switching data indicates diversion ratios of around [ ] per cent between Dove and Simple. The parties argue that such diversion is not high in absolute terms. The OFT notes, however, that it is not so low as to remove concerns over unilateral effects. This is further examined below.

Incentives to increase prices

85. In order to assess the extent of lost competitive rivalry likely to occur as a result of the merger, the OFT may, when available, examine the value of diverted sales that the merging parties lose to each other (in proportional terms) following a price rise. This analysis uses two primary pieces of evidence:[49]

- the closeness of substitution between the parties' brands, as measured by the diversion ratio between them. If the parties' brands are close substitutes, unilateral effects are more likely as the parties will recapture a significant share of the sales lost in response to any price rise post-merger, making the price rise less costly, and

- the variable profit margin on sales. If the variable profit margins of the parties' brands are high, unilateral effects are more likely because the value of sales recaptured by the parties post-merger will be greater, making any price rise less costly.

---

[48] For example, suppose there are three brands A, B and C. Two retailers stock the primary brand, A, and each stocks an additional secondary brand, either B or C. If one stocks B and the other stocks C, and consumers tend to shop within a single retail outlet, the diversion between brands B and C at the retail level will be very low. However, for the retailer at the wholesale level, brands B and C are closest competitors and diversion between them may be significant.

Similarly, consumers make a binary decision to buy a (pack of) bar soap, or not to buy it. So an individual consumer's switching behaviour is total, not partial. However, a retailer can alter the number of facings that it gives a product (partial substitution) without delisting it (total substitution). This may make wholesale diversion greater than retail diversion, all else equal.

[49] See *Merger Assessment Guidelines*, paragraph 5.4.9 and 5.4.10.

86. The greater the indicative change in incentives brought about by the merger revealed by such a calculation, the greater the level of the OFT's concern is likely to be. At the same time, this concern will be weaker if the reliability or probative value of the margin or diversion ratio evidence as a guide is in doubt, for example as discussed above in paragraphs 77-83.

87. The parties provided wholesale variable profit margins for each of their primary brands. These range between [ ]. The parties highlight that these are accounting margins and therefore imprecise: they do not fully take account of the costs which may be considered incremental; and, in particular, they do not fully reflect the significant advertising costs that are involved with such products. However, the parties also submitted that product-specific advertising costs were deducted from the variable profit margins used in the OFT calculations and that other advertising costs not deducted (TV advertising, for example) were related to product sales only 'to a degree'.[50] On this basis, the OFT considered the parties' estimates of their variable profit margins suitable for use in its assessment.

88. The OFT's calculations combine the margin and diversion ratio information to form a gross index of upward pricing pressure by taking the ratio of the value of sales diverted to brand A from brand B to the revenues on volumes lost by brand A (as a result of a price rise),[51] allowing for diversion to more than one brand (that is, to include the constraint that Alberto Culver's Simple and Wright's brands exert on Dove and that Unilever's Dove and Pear's brands exert on Simple).[52]

89. Using this approach, the OFT has estimated a gross upward price pressure index of around [ ] for both the Dove and Simple brands.[53] Mindful of the limitations of the data discussed, the figure is nonetheless not so low as to remove concerns over unilateral effects as a result of the merger.

90. The approach of combining the variable profit margins and diversion ratios in this way provides a measure of the risk to competition resulting from the

---

[50] Parties' response of 25 January 2011 to OFT Further Questions 13-17 and 19-23 of 9 December 2010, paragraph 13.2.

[51] This Gross Upward Pricing Pressure Index, or GUPPI, is given as:

$$\text{GUPPI (product A)} = \frac{\text{(Value of sales diverted to product B) + (Value of sales diverted to product C)}}{\text{Revenues on volumes lost by product A}}$$

[52] This is similar to above but simplifies to provide a cumulative or composite GUPPI of:

$$\text{GUPPI}_A = \left[D_{AB}\frac{p_B - c_B}{p_B} \times \frac{p_B}{p_A}\right] + \left[D_{AC}\frac{p_C - c_C}{p_C} \times \frac{p_C}{p_A}\right]$$

[53] This also takes account of the price ratio between the parties' brands, following submissions made by the parties in this regard.

merger in terms of incentives, rather than in terms of effects (that is, rather than an 'illustrative price rise'). In this particular case, this approach has the benefit of simplicity—especially given the many individual products affected by the merger[54]— and does not require further additional evidence on pass-through or the shape of demand.[55]

Analysis of price promotions

91. To support their view of the absence of any material competitive constraint between their brands, the parties provided analysis of price promotions of the Simple and Dove brands. The parties' analysis examined the effect on sales of the Dove and Simple brands during periods in which the other brand is on price promotion. The parties' told the OFT that their results show that there is no systematic negative effect on the other party's sales when either product is promoted.[56]

92. The OFT notes that bar soap is storable and non-perishable and therefore consumers may 'stock up' on bar soap when it is on promotion. If so, then this would mean the impact on one brand, if any, of promotions of another brand would be felt with a delay, which would be likely to vary from one

[54] In contrast, for example, to cases where the OFT has combined diversion ratios and variable profit margins to calculate 'illustrative price rises'. These cases typically have taken place at the retail level and have involved a single product (albeit a composite one, such as a basket of shopping). The OFT has previously considered diversion ratios in other non-retail cases without combining them with variable profit margins into 'illustrative price rises', see for example *Completed acquisition by GXS of Inovis*, OFT decision ME/4475/10 of 25 June 2010.

[55] A pass-through rate of 100 per cent would mean that the pricing pressure indices calculated may be interpreted as illustrative price rises. However, the parties argue that such an approach would not be appropriate and would contradict typically observed market-wide pass-through rates. The parties were unable to provide empirical estimates of pass-through that would have permitted the OFT to translate this index of price pressure into a magnitude of possible price effects but provided anecdotal evidence suggesting a pass through rate on raw material price increases at the wholesale level of [ ] on Dove. The parties further submit that the pass through of a firm-specific cost increase would be even smaller as the pass-through on firm-specific cost increases is less than the pass through of a market-wide cost increase like raw material prices. However, firm-specific pass-through rates of 100 per cent or more may be observed in practice (see, for example, Simon Evenett 'The Empirical Evidence on the Pass-Through of Firm-Specific Cost Changes to Prices: What Implications for Merger Reviews?' in Current Developments in European and International Competition Law, volume 9, 2008) and pass-through rates of this magnitude have been used in a number of past cases by the OFT. Moreover, firms with more market power may have higher rates of firm-specific pass-through than firms with less market power, complicating the relationship between firm-specific and market-wide pass-through (see, for example, Gregory Werden, Luke Froeb and Steven Tschantz 'The Effects of Merger Efficiencies on Consumers of Differentiated Products' in the European Competition Journal, volume 1, 2005).

[56] The parties' analysis examined the effects of the price promotions involving Dove and Simple SKUs sold in [ ].

promotion to the next.[57] This makes it difficult for the OFT to draw inferences about the extent of competition between Dove and Simple from this analysis alone.

93. In the light of this, the OFT was unsure what weight to attach to the parties' analysis notwithstanding that, taken at face value, it demonstrates a lack of material competitive constraint between Dove and Simple.

Conclusion on bar soaps

94. The OFT's investigation identified several pieces of evidence that raised prima facie concerns over unilateral effects post-merger. These included the parties' high combined market share, the limited number of competitors in bar soaps and the parties' internal documents [ ]. The OFT also received a number of third party concerns, specific to bar soaps. Further, the evidence on diversion and the GUPPI calculations corroborate this view. Set against this, the OFT has only been able to place limited weight on the parties' price promotion analysis. Therefore, on the basis of the above evidence, the OFT considers that the merger gives rise to a realistic prospect of a SLC in the supply of bar soaps in the UK on the basis of unilateral effects.

Hair styling

Shares of supply

95. Unilever is active in styling principally through their Dove and recently acquired Brylcreem brands. Alberto Culver's main styling brands are V05, TRESemmé, Alberto Balsam and Andrew Collinge.

96. In gel, the parties will have a combined share of supply of [30-40] per cent by value with an increment of [10-20] per cent. The merger will bring together the first (VO5), third (Brylcreem), and sixth (Alberto Balsam) strongest brands. Procter & Gamble's (P&G) Shockwaves and L'Oréal's Studioline and Fructis will continue to be the main competitors to the

---

[57] For example, if a promotion of one brand of two-pack bar soap caused consumers who usually bought another brand of 4-pack bar soap to stock up as well as consumers who usually bought another brand of single bar soap, then—provided that single bar soaps are used up quicker than four-packs—any impact of the promotion on sales of rival brands of single bar soap would be felt before the impact on sales of rivals brands of 4-packs. Conversely, promotions of single bars and four-packs may have very different 'impact profiles'.

parties post-merger. Beyond this, the segment appears fragmented with no other brand above a four per cent share.

97. In wax, the parties will have a combined share of supply of [50-60] per cent by value with an increment of [0-10] per cent. The merger combines the strongest brand, VO5, with the fourth strongest, Brylcreem. As with gel, the main constraints are from P&G's Shockwaves and L'Oréal's Studioline and Fructis. Between 2008 and 2010, Brylcreem's value share decreased by over [ ] points from [ ] to [ ].

98. In cream, the merger combines the largest brand, VO5, with the fifth largest, Brylcreem, to create the largest supplier with a combined share of [35-45] per cent by value with an increment of [five-15] per cent. The main constraints are from L'Oréal's Studioline and Fructis and Kao's John Frieda.

99. In non-aerosol styling spray, the parties will have a combined share of supply of [35-45] per cent by value with an increment of [0-10] per cent. The increment represents a recently launched Dove heat treatment SKU.[58] Given the small increment the OFT does not consider that the merger gives rise to a realistic prospect of a substantial lessening of competition in styling spray on the basis of unilateral effects.

100. However, the parties' combined shares of supply for gel, wax and cream are high enough to give the OFT cause for concern over unilateral effects given that these markets, though cautious, are not necessarily the narrowest satisfying the hypothetical monopolist test (see paragraph 60).

101. The parties submit that the position of the Brylcreem brand has deteriorated in recent years: its share of supply in hair styling (excluding hairspray) has declined year-on-year since 2007 and [ ].[59] This contrasts, for example, with the fate of VO5, as its market share has increased since 2008.

102. In the light of this and of the differentiated nature of the parties' brands, the OFT has also considered ways in which some constraints—inside the

---

[58] The OFT initially raised concerns with the parties in aerosol styling spray, as the parties' product was categorised as such in data provided by them to us. The parties subsequently clarified that the Dove SKU is a non-aerosol styling spray. Although the OFT has not been able to consider the extent to which the product market for non-aerosol styling spray can be widened to include all styling sprays, the parties submitted data showing that this would not materially affect the competitive assessment.

[59] [ ].

market or outside it—are more important than others (see paragraphs 13 and 62). This is discussed below.

Closeness of competition

Brylcreem's market position

103. The parties submit that Brylcreem is significantly differentiated from other styling brands. Brylcreem is a heritage brand associated with traditional male grooming. This is supported by Brylcreem's in-store positioning, where it is located in the 'men's grooming' fixture, rather than with other styling products such as VO5 and Shockwaves. According to the parties, the brand is targeted almost exclusively to male consumers, in contrast to more modern styling brands such as VO5 and Shockwaves, which are targeted at both men and women and are perceived as 'lifestyle' brands. Usage data was provided by the parties confirming the gender usage split. Further, TRESemmé and Andrew Collinge offer salon quality brands for use in the home aimed primarily at females.

104. The parties therefore assert that none of Alberto Culver's brands are close competitors to Brylcreem. They note that there are some male-orientated VO5 sub-brands, such as 'VO5 Extreme' but their gender usage distinction is far less pronounced than for Brylcreem. As with other VO5 styling products, 'Extreme' is shelved in the styling fixture in retail stores, whereas Brylcreem is displayed besides men's toiletries and therefore the products compete for promotion sites separately. Further, retailers tend to negotiate with Brylcreem alongside men's toiletries, rather than the hair category as for VO5. The parties therefore do not consider even VO5 sub-brands to be close competitors to Brylcreem.

105. This evidence is corroborated by the internal documents provided by the parties. [ ].[60][61]

Third party comments

106. While a limited number of third parties highlighted that VO5's Extreme sub-brand and Brylcreem target the same male audience, no third party pointed to Brylcreem and any of the Alberto Culver brands as being close competitors.

---

[60] [ ].
[61] [ ]

Pricing points

107. The parties submitted analysis of retail prices in two major supermarkets that indicated that the parties' products in wax and gel are not as closely aligned as those of third parties. Although the parties' prices are more closely aligned in cream, there are a number of third party brands with similar price points.

108. Pricing analysis by the OFT was consistent with this and found that, although Brylcream and VO5 occupy similar mid-tier price points, there is a continuum of brands across price points with competitors (for example, Shockwaves, Studio Line and Fructis) priced at or between Brylcreem and VO5.

Switching data

109. The parties provided data which showed the extent of consumer switching between brands at the aggregate level; that is, across all hair styling products.[62] This data does not capture switching in the narrow markets for gel, cream and wax identified by the OFT. The OFT nonetheless regarded it as a reasonable proxy for switching in each but was mindful of this limitation (as well as the others previously discussed) when considering it.

110. The consumer switching data shows cumulative diversion from Brylcreem to the Alberto Culver brands of over [ ]. However, the parties submitted that this diversion ratio should be seen in the context of the high level of diversion away from Brylcreem generally, as evidenced, for example, by a diversion ratio to L'Oreal of [ ], despite L'Oreal's smaller market share. As further evidence of this, the parties pointed to the diversion ratio from the Alberto Culver brands to Brylcreem, which is low at less than [ ]. The parties submitted that this was because the motivation for the switching is less likely to reflect a competitive constraint from another brand on Bryclreem as much as Brylcreem's decline. There was no evidence in third party views to suggest otherwise (in contrast to bar soaps).

111. Combining this diversion with the variable profit margins for the parties' primary styling brands, which range from just under [ ] on Brylcreem and Alberto Balsam to [ ] on VO5, gives a gross upward price pressure index

[62] The data and framework for analysis are the same as that used in relation to skin cleansing, a description of which can be found at paragraph 85-88.

of around [ ].[63] This is not so low as to remove concerns over unilateral effects as a result of the merger.

112. The parties submitted, however, that any incentive to increase price was likely to be mitigated as a result of Brylcreem's decline, which has been significant with the volume of sales declining by nearly [ ] since 2007. Further, the parties argued that the consumer diversion ratio data is an especially imprecise proxy for retailers' preferences in relation to hair styling because the brands are negotiated with separate buyers within the individual retailers as Brylcreem is purchased along with other men's grooming products. The buyer will thus be taking into consideration products such as deodorants and shaving foams when deciding whether or not to list Brylcreem, weakening the link between consumers' preferences and retailers'.[64]

113. For these reasons, the OFT was not able to attach as much evidentiary weight to the level of diversion between the parties in hair styling—and to the gross upward price pressure indices—as it was able to attach in bar soaps.

Conclusion on hair styling

114. The parties' combined share of supply is high enough to give the OFT cause for concern over unilateral effects. The evidence on diversion between the parties corroborates this, suggesting that the merger may give them an incentive to raise price.

115. However, Brylcreem has a distinct position in the market: [ ]. Further, it is exclusively male targeted, is often located in another part of the store in the men's grooming fixture to other styling products and is procured by different retail buyers to other hair styling products.

116. Although consumer switching from Brylcreem to the Alberto Culver brands appears high, the limitations of the switching data for hair styling in particular mean that the OFT cannot attach as much weight to the diversion evidence and gross upward price pressure indices as in bar soaps (see paragraph 89). The evidence available to the OFT suggests that the competitive constraint that Brylcreem places on VO5 is limited and the parties' internal documents [ ]. Indeed, the parties' analysis and the OFT's

---

[63] On the basis of *Kantar Worldpanel* data for the 52 weeks to the end of January 2011.
[64] [ ].

indicates that Brylcreem competes with numerous comparably priced brands including P&G's Shockwaves and L'Oreal's Studioline and Fructis as well as Alberto Culver's VO5. Lastly, no third party raised concerns about the merger in hair styling.

117. On the basis of the above, the OFT considers that the merger does not give rise to a realistic prospect of a substantial lessening of competition in the supply of hair styling products in the UK on the basis of unilateral effects.

Hair care

Shares of supply

118. Unilever is active in hair care principally through their Timotei and Dove brands and Alberto Culver are active mainly through their VO5, TRESemmé, Alberto Balsam, and Andrew Collinge brands.

Shampoo

119. The parties combined share of supply in shampoo is [10-20] per cent by value (with an increment of [0-10] per cent).[65] Given that the OFT has drawn the market for shampoo narrowly (albeit not necessarily as the narrowest market satisfying the hypothetical monopolist test) this market share would not ordinarily give the OFT cause for concern over unilateral effects. The merger brings together the second and fifth largest suppliers that currently have five of the top 10 brands.

120. Nevertheless, Procter & Gamble will remain the strongest competitor with the three strongest brands and a combined share of supply of [35-45] per cent by value. L'Oreal has the fourth strongest brand, Elvive and beyond this, there are a number of smaller brands. The main competing brands to the merging parties have all increased share of supply over the last three years.

Conditioner

121. The parties combined share of supply post-merger would be higher than in shampoos at [15-25] per cent by value (with an increment of [0-10] per cent). Again, however, given that the OFT has drawn the market for conditioner narrowly (albeit not necessarily as the narrowest satisfying the

[65] This slightly overstates the merging parties' position as the Sunsilk and Elida brands have both been discontinued.

hypothetical monopolist test) this market share would not ordinarily give the OFT cause for concern over unilateral effects. All of the parties' brands are stronger in conditioners than shampoos, with the exception of Dove. There are four leading brands, each with around [0-10] to [five-15] per cent of supply: Pantene, Herbal Essences, Elvive, and TRESemmé. Proctor & Gamble remains the leading supplier post-merger, despite Head & Shoulders being a relatively weak brand in conditioner.

Treatments

122. The parties will have a combined share of supply in treatments of [10-20] per cent by value with a small increment, through Unilever's Vitapointe, of [[0-10] per cent. Given that the OFT has drawn the market for conditioner narrowly (albeit not necessarily as the narrowest satisfying the hypothetical monopolist test) this market share would not ordinarily give the OFT cause for concern over unilateral effects. The top four brands, John Frieda, Aussie, Elvive, and Pantene, are supplied by competitors. There are also a significant number of smaller brands and suppliers active in treatments.

123. That said, and in the light of the differentiated nature of the parties' brands of shampoo, conditioner and treatments, the OFT has also considered ways in which some constraints—inside the market or outside it—are more important than others (see paragraphs 13, 62 and 102). This is discussed below.

Closeness of competition

Competing brands

124. The parties submit that their brands in shampoos and conditioners are not close competitors, with TRESemmé and Andrew Collinge marketed as salon quality products for use in the home, while Dove and Timotei are positioned as mainstream retail brands. The parties do not consider their brands in treatments to be close competitors either.

125. Although the parties' internal documents [ ].[66] The parties submit that the hair care sector in the UK is highly competitive and characterised by intense competition on prices and promotions with low brand loyalty. In support of this, the parties provided data to show that over [ ] of shampoos and conditioners sold by volume are on promotion.

[66] [ ].

Third party comments

126. Some customers indicated that the parties' brands were close competitors. In particular, Dove and VO5 were highlighted by four of the largest six retail customers as competing for the same consumers on the basis of pricing, switching and promotional activity. However, on the whole, retailers also considered there to be alternative brands that they and consumers could switch to. Alternative brands highlighted include Pantene, Aussie, Herbal Essence (all P&G) and L'Oreal Elvive.

127. Competitors also broadly confirmed this view, indicating there would be a number of brands post-merger that customers could switch to in the event of a price rise by the merged parties.

Pricing points

128. The parties and third parties indicated that brands are generally tiered by price relative to the market average. For example, one third party pointed to four pricing 'corridors': low, mid, premium, and super-premium. The parties undertook analysis on retail prices in two major supermarkets that illustrated a continuum of price points. In both supermarkets, Dove tends to be positioned in a higher pricing corridor than do the Alberto Culver brands. Dove therefore overlaps with the price positions of several other brands, including Herbal Essences and Elvive. Timotei, however, is closer to the price point of the Alberto Culver brands, and Fructis and Wash&Go also occupy similar pricing positions. The parties submit that for conditioners and treatments, their brands are generally at the lower end of the range, but again there are a number of third party brands at the lower end including Garnier Fructis and Herbal Essences.

129. Comparable analysis undertaken by the OFT on the pricing points of shampoos and conditioners corroborated the parties' submissions, illustrating fourteen major brands supplied by at least six different suppliers overlapping with the price points of the parties' brands.

130. [ ].[67]

[67] [ ].

Switching data

131. The parties provided data which shows the extent of consumer switching between their shampoo and conditioner brands (comparable data was not available for treatments).[68] At the retail level, Dove shampoo and conditioner interacts most closely with Pantene, L'Oreal Elvive and Herbal Essences, followed by TRESemme and VO5. Timotei interacts most closely with Herbal Essences, Pantene and TRESemme.

132. The parties provided separate variable profit margin information for their shampoos and conditioners. These vary across the brands, with [ ] shampoo having the lowest gross margin of [ ] and [ ] conditioner the highest at [ ]. The diversion ratios for Dove and Timotei to and from individual Alberto Culver brands are all under [ ], although cumulative diversion from Dove and Timotei to all the Alberto Culver brands is [ ] and [ ], respectively, indicating some degree of switching between the parties' brands. Combining the two pieces of evidence, gives a gross upward price pressure index for Unilever's brands of hair conditioner of between [ ], which is comparable to those in bar soaps. This is not low enough to rule out concerns over unilateral effects as a result of the merger but contrasts with the shares of supply and other evidence discussed.

Conclusion on hair care

133. The parties will have a combined share of supply of [10-20] per cent by value in shampoos, [20-30] per cent by value in conditioners and [10-20] per cent by value in treatments.

134. [ ], some third parties considered that the parties' brands of Dove and VO5 do compete. This was supported by the evidence on diversion between the parties' shampoo and conditioner brands which indicated that the merger may give them an incentive to increase price. However, third parties also identified a number of brands that competed with those of the parties including Proctor & Gamble's Herbal Essences and Pantene, and L'Oreal's Elvive. Consistent with this, the parties' analysis of pricing points and that of the OFT indicates that the parties' brands are no closer as competitors to each other in the 'mid price' segment than other brands are to them.

[68] The framework for analysis and an explanation of the data are the same as that outlined for bar soaps at paragraphs 85-88 and is not repeated here. The data is purchased from Kantar Worldpanel and covers shampoos and conditioners but not treatments.

135. On the basis of the above and the fact that a number of strong competitors to the merged entity have been identified, the OFT does not consider that, on balance, the merger gives rise to a realistic prospect of a substantial lessening of competition, on the basis of unilateral effects, in the supply of hair care products in the UK.

BARRIERS TO ENTRY AND EXPANSION

136. When assessing possible supply-side responses, including entry, expansion and repositioning, the OFT will consider whether the response would be (i) timely, (ii) likely, and (iii) sufficient to replace the constraint removed by the merger.[69] In terms of timeliness, the guidance suggests that the OFT will typically look for entry to occur within two years.

Prospect of Entry

137. The parties submit that there are no significant barriers to entry (or expansion) for personal care products such as hair care, hair styling or bar soaps in terms of access to raw materials, technology or production capacity.

138. The parties consider that the manufacture of all personal care products is not especially complex and does not involve essential proprietary technologies that would form a material barrier to entry. Third party manufacturers are commonly used, which can make entry easier.

139. Branding, although normally considered to represent a barrier to entry and expansion, is less of a barrier, according to the parties, as suppliers active in adjacent markets can extend their brands into other markets. These suppliers already have the distribution network and customer relationships. The parties point to the many personal care brands which span numerous product categories. Notable examples were highlighted where brands have been extended across skin cleansing and skin care, from hair care into hair styling, and even from non-personal care categories.

140. There was general support from third party competitors that manufacturing and production was not a constraint on entry. Some also pointed to the availability of third party manufacturers.

[69] *Merger Assessment Guidelines*, paragraph 5.8.3.

141. However, third parties highlighted that the advertising and promotional expenditure associated with building a brand and achieving sufficient presence to challenge the existing brands was significant and cases of successful entry were uncommon. This would involve significant costs and lead times to build a brand.[70]

142. Third parties indicated that it may be feasible to establish a niche, premium brand.[71] However, in bar soaps—where the OFT considers that the merger gives rise to a realistic prospect of an SLC—Dove is not a niche brand and third parties considered that it was more challenging to establish new mass-market brands. The difficulties in obtaining sufficient shelf space so as to compete effectively were considered significant.[72]

143. The OFT notes that of the brands highlighted by the parties as new entrants in hair care and hair styling, very few have gained sufficient traction so as to be considered a competitive constraint to the parties. Of the few that have entered, they either exited soon after or are specialist, premium or niche brands (such as Phil Smith or Tantrum Kids). In bar soaps, the parties recognise that the steady decline seen in bar soaps may deter investment in the segment and entry is limited.

144. On the basis of third party views, the OFT considers that the prospect of new entry, sufficient to constrain the parties, is low, largely because of the high cost required in brand development and listing.

---

[70] An estimate provided suggested lead times would be up to 2 years minimum.

[71] For example, John Freida or Charles Worthington. Similarly, Alberto Culver's TRESemme brand successfully entered the market in 2004 but it is considered to be a salon-quality product.

[72] One third party commented that, even if a retailer was willing to stock a new product, a brand that did not reach 3 per cent value share would risk being delisted very quickly.

Prospect of Expansion and Repositioning

145. The parties submit that innovation is an important factor in the personal care sector and provide examples of new product developments across the categories. It is argued that innovation is used to bring new consumers into the category as well as encouraging switching from competitor brands. The parties also submit that products are re-launched on a regular basis to meet consumers' changing requirements and tastes, and to maintain competitiveness. The parties submit that with particular regard to hair styling, a manufacturer with an established brand can easily and quickly extend that brand into a new format without significant additional advertising and promotional costs.[73]

146. Re-launches typically involve incremental improvements to the product whether through one or more of improved formulation and/or new packaging. New variants may also be included as part of a product re-launch.

147. [ ].[74] However, no evidence was provided by the parties to indicate the extent to which competitors expanding or repositioning their brands would act as a competitive constraint on the parties post-merger.

Conclusion

148. The parties have provided details of repositioning (through re-launches and innovation) and sought to show that new entry is feasible in the relevant product markets. However, third party views indicate that barriers to entry do exist and that the steady decline in bar soaps may deter investment in this segment. Therefore the OFT considers that new entry specifically in relation to bar soaps is unlikely to be timely, likely or sufficient to replicate the competitive constraint lost as a result of the merger.

BUYER POWER

149. The parties submit customers have significant buyer power, based on a number of factors: the concentration of customers and the balance of negotiating power lying with the customer; the ability to easily switch or

[73] The parties estimate that for the growth area for new formats of hair styling products in the youth segment, an effective campaign may cost £200,000-500,000 per annum.
[74] [ ].

de-list a brand/SKU and evidence of switching; and the presence of private label. The OFT considers the evidence for each of these in turn.

Negotiations and Evidence of Switching

150. The parties submit that their main customers in the UK are large and sophisticated retailers and that between [ ] of personal care sales (in the overlap categories) are made through the 'big four' supermarkets[75] and the two major specialist healthcare and beauty retail chains, Boots and Superdrug.

151. According to the parties, if suppliers lose a listing in one of these retailers, even if only a few key SKUs, it can result in a significant loss of sales. Further, if a product is not stocked by retailers, the result can be a swift decline in consumer interest, making it more difficult for the manufacturer to access those consumers in future. The significant level of investment associated with brand development is wasted if the brand is not stocked by retailers.

152. [ ].

153. As a result of these complex negotiations and the importance of retailers as a route-to-market for the suppliers, the parties submit the balance of power in negotiations lies with retailers. Further, retailers have a body of tools at their disposal that can be used to negotiate better deals from suppliers. The parties provided evidence of the negotiations they undertake with suppliers, including examples of where retailers have (i) decided not to list products or switched significant volumes to alternative suppliers; (ii) requested lump-sum payments; or (iii) requested promotional and other support. [ ].

154. Third party views on the extent of buyer power did not corroborate the parties' views, however. Retailers generally indicated that where de-listings occur these are due to poor sales, not because of disciplining suppliers. Further, some retailers highlighted a number of brands as being essential to stock, including TRESemme, VO5, Dove, and Simple. Consistent with this, competitors—though confirming the tools used by retailers in negotiations—also pointed to buyer power being dependent on the size of the brand: brands that have smaller shares of supply are more at risk of being de-listed and have very little ability to pass on cost price increases. Further, some competitors indicated that the negotiating strength of

[75] Tesco, Sainsbury's, Asda and Morrison's

retailers can be offset by the portfolio and strength of brands of the supplier, and the merger is expected to improve the parties negotiating position relative to retailers.

155. The OFT considers the evidence on the extent of countervailing buyer power to be mixed. Whilst it is clear that retailers have significant tools at their disposal in negotiations with suppliers and the parties provided evidence to show that retailers have on occasion used these tools such as de-listings and requesting promotional support, negotiations are not entirely one-sided.[ ].[76]

156. The OFT also notes the comments of third parties in that the transaction will strengthen Unilever's position in bar soaps and in hair care and hence is expected to improve the parties negotiating position relative to retailers. As set out in the OFT's guidelines,[77] for countervailing power to prevent an SLC, it is not sufficient that it merely existed before the merger. It must also remain effective following the merger. In addition, even if there is evidence of countervailing buyer power for the large retailers, it is not clear that this would apply to (or protect) smaller retailers. The OFT received only very limited responses from smaller retailers.

Own Label

157. The OFT considers that as the merger concerns firms at the manufacturing or wholesale level and thus switching between brands or to own label is at the retail level, then the competitive constraint from own label should be considered as part of a broader overall assessment of buyer power. The extent of the constraint from own label is determined by the degree to which retailers can substitute one for the other, shift shelf-space allocation between them, or simply use the threat to do so as leverage in negotiations with suppliers.

158. The parties submit that own or private label products are particularly relevant. For example, in bar soaps, private label has a share of supply of [10-20] per cent (by value) and [15-25] per cent (by volume).[78] The parties also provided figures for the share of sales that private label bar soaps account for in four of the major retailers.[79] The shares ranged from [ ] per

[76] [ ].
[77] *Merger Assessment Guidelines*, para. 5.9.8.
[78] SymphonyIRI, 52 w/e October 2010.
[79] The parties' response to the OFT's Issues paper Table 5.2 and 5.3 (Source: Symphony IRI)

cent[80] by value and the parties also noted the high weighted distribution of these products. The parties therefore argue that private label products exercise a strong constraint on branded products. The parties also submit that supplying own label products allows retailers to drive consumer loyalty and improve volume sales. In addition, it gives retailers visibility as to the costs of manufacturing the relevant products, which strengthens their bargaining position vis-à-vis branded suppliers.

159. The OFT does not accept the parties characterisation of own label products. First, it is clear that the presence of own label products is highly variable across the relevant product categories. In some of the relevant product categories (conditioner, treatment, wax, cream and a styling spray) private label has absolutely no presence at all or negligible presence. In these categories, the OFT does not consider private label products to represent any constraint on the parties.

160. Second, in those product categories where the share of private label is more material for example [ ] by value in bar soap, the OFT does not accept that own label can be considered as a single aggregate brand, where all of the different own label brands together represent a single competitive constraint. In such differentiated product segments, the OFT considers it appropriate to assess the constraint of own label products on a brand-by-brand basis (or at the least on a customer-by-customer basis) and the extent to which individual own label brands (or customers) may represent a competitive constraint. As evidenced by the parties own submission, own brand sales can vary significantly between retailers.

161. Third, the OFT considers that retailers will generally have a preference for stocking higher margin branded goods over lower margin own label products, particularly where shelf-space is limited and there is a trade-off between the two (for example, in convenience stores).

162. Evidence provided by third parties broadly supported the OFT's view, indicating that own label is a weak constraint, particularly in the hair care and hair styling categories, where the presence of own label is small and branding is important. A limited number of third party competitors did point

[80] One retailer provided an estimate of its own private label share of supply in bar soaps to the OFT which was significantly lower than that provided by the parties and therefore the OFT is cautious in accepting the parties' figures. Further, no evidence was provided to indicate that those retailers with a relatively high proportion of private label sales successfully used this in negotiations with suppliers to obtain higher margins on branded goods.

to retailers using the potential to increase the supply of own label products in negotiations for branded goods.

163. However, this was not the majority view with many other competitors explicitly stating own label products are not used as leverage in negotiations for their own branded products. For example, in the product category where private label presence is greatest, bar soaps, it was highlighted that retailers were unlikely to use the potential to increase the supply of own label in negotiations due to the rate of sale and premium offering delivered by branded listings. Further, it was indicated that own label share in bar soaps (and liquid hand wash) has declined in recent years as the promotional intensity on branded products has increased.

Conclusion on Buyer Power

164. The OFT considers there to be insufficient evidence to support the view that buyer power would provide a competitive constraint on the parties post-merger in any of the product categories considered.

THIRD PARTY VIEWS

165. The OFT received comments from major customers and competitors of the parties. The OFT has included specific reference to third party views in the above detailed assessment but for the sake of completeness, notes the following.

166. The OFT received the following concerns from customers. Two customers expressed concerns over the increased concentration in the personal care market as a result of the merger and believed this may have a negative impact on innovation and reduce their negotiating strength. Concerns of one customer focused on hair care and whether post-merger the parties may move away from VO5 and drive the Dove brand in isolation. Another customer had specific concerns relating to Simple; the customer considers that Simple is a niche brand designed for sensitive skin; that Dove is a close competitor and that there are few alternative competitors.

167. The OFT received the following concerns from competitors which were, on the whole, consistent with those raised by consumers. A number mentioned that the merger is likely to strengthen Unilever's position in mid-

tier hair care; others considered Dove and Simple to be close competitors in shampoos but also noted that there are several competitors in the mid-tier segment of the market providing sufficient choice to customers. There were a number of concerns expressed in relation to the Simple brand and that it was considered to be a close competitor to Dove in skin cleansing. Specific concerns focused on bar soaps and the consolidation that would result from the merger. One competitor expressed the view that this would allow Unilever to 'manage the category with the retailers due to their combined strength'.

168. The merger is expected to result in an increased concentration in the personal care market. However, in hair care, the evidence indicated that there will continue to be numerous competitors active in the mid-priced segment that are expected to provide a sufficient competitive constraint on the merged parties. The OFT found no evidence to indicate that the merger may have a negative impact on innovation.

169. The OFT's investigation found that Simple bar soap provides an effective constraint on Dove and this, together with third party concerns lead to the OFT finding an SLC in bar soaps.

ASSESSMENT

170. The parties overlap in a number of personal care product categories. [81] The OFT's investigation focused on hair care, hair styling and skin cleansing.

171. The **skin cleansing** category is principally made up of bar soaps, liquid hand wash, and products for use in the bath or shower. As no competition concerns were identified in relation to bath and shower products or liquid hand wash, these were not considered further and the OFT focused its competitive assessment on bar soaps.

172. The parties estimate that post-merger they will have a combined share of supply of [40-50] per cent by value (with an increment of [five-15] per cent) in **bar soaps**. The merger will strengthen Unilever's position as the strongest supplier of bar soaps and bring together the strongest and third

[81] Due to the low shares of supply of the parties, the OFT did not consider that the transaction raised competition concerns in hair and body care, face care, lip care and deodorants.

strongest brands in Dove and Simple. The high share of supply figures raised prima facie concerns. Further, a number of third parties commented on the closeness of competition between Dove and Simple. Whilst the OFT did not find evidence to suggest that Simple and Dove were the closest competitors, there was evidence ([ ]) to indicate that Simple acted as a significant competitive constraint on Dove. Finally, the diversion ratios based on customer switching between products were not so low as to remove OFT's concerns.

173. As a result, the OFT considers that the transaction gives rise to a realistic prospect of an SLC in bar soaps.

174. In **hair styling**, the parties estimate that post-merger they will have a combined share of supply of [35-45] per cent in hair styling (excluding hairspray) with an increment of [0-10] per cent. The share of supply in each of the hair styling formats of gel, wax, and cream are [30-40] per cent, [50-60] per cent and [35-45] per cent respectively.[82] Despite these relatively high market shares, no third party contacted by the OFT raised concerns regarding the transaction.

175. The OFT considered the degree to which Brylcreem (which it recently acquired from Sara Lee) competed with the hair styling products of Alberto Culver, particularly VO5. [ ]. Further, it is exclusively male targeted and is often located in another part of the store in the men's grooming fixture to other styling products and is procured by different retail buyers to other hair styling products.

176. Whilst there appears to be switching from Brylcreem to the Alberto Culver brands, the parties submitted that this has to be considered within the context of the high level of switching away from Brylcreem generally as the brand declines in popularity. Further, the competitive constraint that Brylcreem places on VO5 is considered to be limited. Added to this, the parties' analysis and the OFT's indicates that Brylcreem competes with numerous comparably priced brands including P&G's Shockwaves and L'Oreal's Studioline and Fructis as well as Alberto Culver's VO5.

[82] Due to the limited overlap in aerosol styling spray no competition concerns were identified.

177. On the basis of the evidence available and in the absence of third party concerns, the OFT does not consider that the merger is expected to result in a SLC in hair styling.

178. In **hair care**, the parties estimate that post-merger they will have a combined share of supply based on value of [10-20] per cent in shampoo (increment of [0-10] per cent), [20-30] per cent in conditioner (increment of [0-10] per cent) and [10-20] per cent in treatments (increment of [0-10] per cent). Proctor and Gamble will remain the strongest competitor with the three strongest brands of Head & Shoulders, Pantene Pro V and Herbal Essences. Although some third parties noted that the transaction would strengthen Unilever's position in the mid-tier segment and some considered that both Dove and VO5 competed in this segment a number of other competitors were identified that would provide a sufficient competitive constraint on the parties.

179. This was confirmed during the investigation. Despite evidence of switching between the parties' brands, the OFT identified a number of competing brands in the hair care sector, specifically those of P&G that are expected to continue to act as a strong competitive constraint on the parties post-merger. The OFT does not, therefore, consider that the merger is expected to result in a SLC in hair care.

180. The OFT found no evidence that entry and/or expansion would be timely, likely or sufficient to replicate the competitive constraint of Simple in bar soaps which would be lost as a result of the merger. Indeed, a number of third parties noted that as retailers continue to reduce the shelf space allocated to bar soap, its steady decline is likely to deter investment in the segment.

181. The OFT also considered the extent to which countervailing buyer power including the use of own label would provide a competitive constraint on the parties post-merger. The parties provided evidence of their negotiations with suppliers, but while it was clear that retailers have significant tools at their disposal in negotiations with suppliers, it is not entirely one-sided. Evidence indicated that the parties had successfully implemented price increases. Further, evidence from third parties indicates that own or private label is a weak constraint, particularly in those categories where branding is important.

182. Consequently, the OFT believes that it is or may be the case that the merger may be expected to result in a substantial lessening of competition within a market or markets in the United Kingdom.

UNDERTAKINGS IN LIEU

183. Where the duty to make a reference under section 33(1) of the Act applies, pursuant to section 73(2) of the Act the OFT may, instead of making such a reference, and for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has or may have resulted from it or may be expected to result from it, accept from such of the parties concerned undertakings as it considers appropriate.

184. As explained in the OFT's guidance, [83] in order to accept undertakings in lieu of reference, the OFT must be confident that all the potential competition concerns that have been identified in its investigation would be resolved by means of the undertakings in lieu without the need for further investigation. The need for confidence reflects the fact that, once undertakings in lieu have been accepted, this is final in terms of the OFT's ability to refer, as section 74(1) of the Act precludes a reference after that point.

185. Undertakings in lieu of reference are therefore appropriate only where the remedies proposed to address any competition concerns raised by the merger are clear cut. Furthermore, those remedies must be capable of ready implementation.

186. The parties offered a package of undertakings on a 'without prejudice' basis comprising the following main elements:

(i) the divestment of the Cidal and Wright's soap brands. Under this proposal, manufacture of the products supplied under both brands is outsourced and Unilever would use reasonable endeavours to procure an assignment to the licensee of the benefit of the relevant manufacturing contracts, and

[83] Mergers - *'Exceptions to the duty to refer and undertakings in lieu of reference guidance'* (OFT1122)

(ii) the divestment of the Simple brand to be effected by either a perpetual and royalty-free licence of the Simple brand for bar soaps or a partial assignment of the Simple brand in bar soaps governed by a co-existence agreement. The geographic scope of the licence would be the UK, Ireland and the Channel Irelands. As part of the licence, the licensee would obtain all existing inventory and get full access to the formula used for the manufacture of Simple bar soap products. Manufacturing of these products is currently outsourced and Unilever is prepared to use reasonable endeavours to procure an assignment of the benefit of the relevant contract(s).

187. In assessing whether this package of assets would be sufficiently clear cut to address the concerns arising from the merger, the following factors were considered.

(i) Unilever submitted that a remedy that included other Simple branded products would be disproportionate since the sales of Simple bar soap represents less than [ ] of sales attributable to the Simple brand in the UK. As set out in the OFT's guidance, the scope of the undertakings in lieu should not go beyond what is necessary in order to remedy identified competition concerns in any particular case.[84] The divestment replicates the full constraint in bar soaps which would be lost as a result of the merger and therefore the OFT is satisfied that the remedy addresses the competition concerns identified.

(ii) The licence for Simple bar soaps does not include any rebranding obligation on the purchaser. The OFT considered it unlikely that any confusion arising from the fact that Unilever would own the Simple brand in product categories other than bar soap would result in consumer detriment. Further, the licence would incorporate terms designed to ensure a level of coherence in the brand identity for Simple and to prevent the licensee taking steps that may harm the brand, such as offering products for sale that did not meet quality or safety standards. Also, as bar soaps represent less than [ ] of the overall revenues for Simple, the OFT considers that there will be no incentive for the parties to downgrade the brand following its divestment.

---

[84] Mergers - *'Exceptions to the duty to refer and undertakings in lieu of reference guidance'* (OFT1122) paragraph 5.15

(iii) The terms of the licence would allow the licensee autonomy in relation to key aspects of commercial policy, in particular on pricing and promotional behaviour. Simple bar soap is not currently advertised, so any licensee would also benefit from the 'halo' effect of future Simple brand advertising by Unilever.

(iv) In reviewing prospective purchasers in this case, the OFT will follow its published guidance dealing with the restoration of competition in accepting remedies. The purchase will need to lead to an outcome that restores competition to the level that would have prevailed absent the merger, thereby comprehensively remedying the substantial lessening of competition identified in relation to bar soaps; or where divestment to a purchaser would clearly and comprehensively remove the substantial lessening of competition identified.[85]

188. The OFT welcomes the willingness of the parties to put forward remedies. It should be noted that, as a phase one body, the OFT rarely accepts non-structural remedies. Nevertheless, the OFT considers that that the remedy proposed in this particular case to be, in effect, tantamount to a permanent structural solution and therefore sufficiently clear cut to remedy the competition concerns arising from the merger.

189. The OFT has therefore considered whether it would be appropriate to suspend its duty to refer.

Up-front buyer

190. The OFT considered whether it is appropriate in the circumstances of this case to require that the relevant divestments are made in whole to an up-front buyer.

191. An up-front buyer requirement means that the proposed purchaser will have committed contractually, subject to formal OFT approval of the undertakings in lieu, to acquiring the relevant divestment before the OFT accepts undertakings in lieu. This means that the OFT will accept

[85] See Mergers - *'Exceptions to the duty to refer and undertakings in lieu of reference guidance'* (OFT1122) paragraph 5.11

undertakings in lieu only where a provisional sale has been agreed, thereby demonstrating that a sale to a suitable purchaser is achievable. It also means that the OFT may consult publicly on the suitability of the proposed divestment purchasers, as well as any other aspects of the draft undertakings, during the public consultation period.

192. The OFT will seek an upfront buyer where the risk profile of the remedy requires it, for example where the OFT has reasonable doubts with regard to the ongoing viability of the divestment package and/or there is only a small number of candidate suitable purchasers for the divestment business that would remedy the competition concerns. Such doubts may arise, for example, because there are questions about the commercial attractiveness of the divestment business in question or where the field of suitable potential candidate purchasers is very limited.[86]

193. The parties have indicated that they are prepared to accept the need for an upfront buyer for this remedy package if required. The OFT considers that the nature of the remedy which involves the splitting of the Simple brand to have a higher risk profile than a divestment remedy and that there is a need to approve the purchaser in these circumstances. The OFT therefore considers that the requirement for an up-front buyer is both reasonable and proportionate in seeking to ensure that competition concerns are remedied.

DECISION

194. The OFT has therefore decided to refer the anticipated acquisition by Unilever of Alberto Culver Company to the Competition Commission pursuant to section 33 of the Act. However the OFT's duty to refer is suspended because the OFT is considering whether to accept undertakings in lieu of reference from Unilever pursuant to section 73 of the Act.

[86] Mergers - *'Exceptions to the duty to refer and undertakings in lieu of reference guidance'* (OFT1122 paragraph 5.33